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United States

1319
Circuit Court of Appeals

For the Ninth Circuit.

GEORGE WILLS & SONS, LIMITED, a Corpora-
tion,

Plaintiff in Error,

vs.

WILLIAM R. LARZELERE and JOSEPH J.
SWEENEY, Copartners Doing Business Un-
der the Firm Name of LARZELERE,
SWEENEY COMPANY,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.

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United States
Circuit Court of Appeals
For the Ninth Circuit.

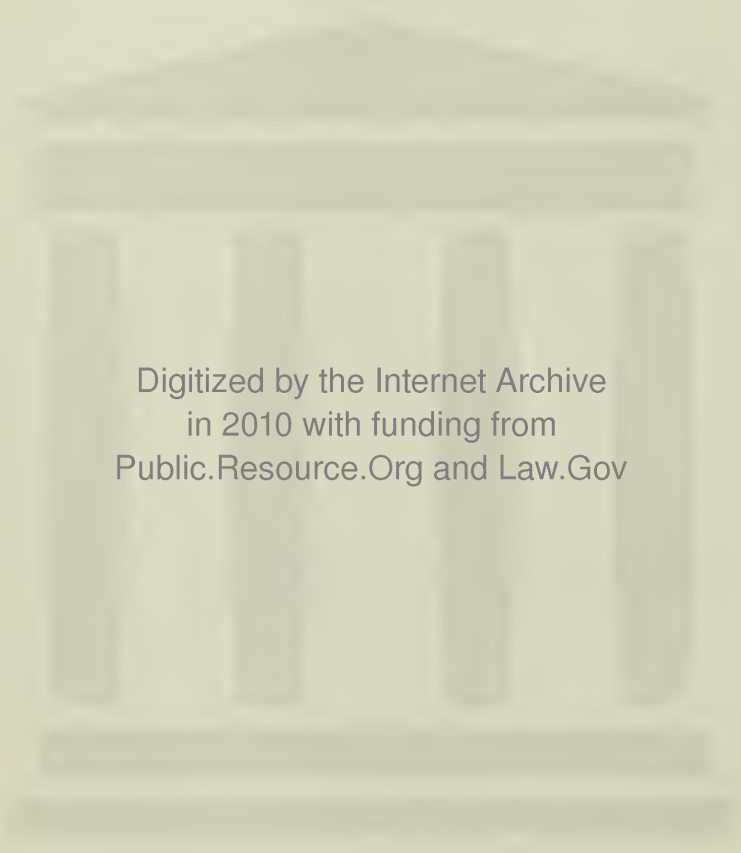
GEORGE WILLS & SONS, LIMITED, a Corporation,
Plaintiff in Error,

vs.

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SWEENEY, Copartners Doing Business Under the Firm Name of LARZELERE,
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Names and Addresses of Attorneys of Record.

ALFRED J. HARWOOD, Esq., Kohl Building,
San Francisco, Calif.,
Attorney for Plaintiff in Error.

CHARLES W. SLACK, Esq., and EDGAR T.
ZOOK, Esq., Alaska Commercial Building,
San Francisco, Calif.,
Attorneys for Defendants in Error.

In the Southern Division of the District Court of
the United States in and for the Northern
District of California, Second Division.

No. 16,090.

GEORGE WILLS & SONS, LIMITED, a Cor-
poration,

Plaintiff,

vs.

WILLIAM R. LARZELERE and JOSEPH J.
SWEENEY, Copartners Doing Business
Under the Firm Name of LARZELERE,
SWEENEY COMPANY,

Defendants.

Complaint.

Now comes George Wills & Sons, Limited, a
corporation, duly organized and existing under
and by virtue of the laws of the United Kingdom
of Great Britain and Ireland, and lawfully trans-

acting business in the State of California, and in the City and County of San Francisco in the Southern Division of the Northern District thereof, and complains of the defendants, William R. Larzelere and Joseph J. Sweeney, copartners doing business under the firm name of Larzelere, Sweeney Company, and for cause of action alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland; and at all of said times was lawfully transacting business in the City and County of San Francisco, in the Southern Division of the Northern District of California.

II.

That defendants are, and at all times herein mentioned were, copartners doing business under the firm name of Larzelere, Sweeney Company; that each of said defendants is, and at all times herein mentioned was, a citizen and resident of the State of California. [1*]

III.

That the amount in controversy in this suit exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000); that this suit is between citizens of the State of California and a citizen and subject of a foreign State,

*Page-number appearing at foot of page of original certified Transcript of Record.

viz., the United Kingdom of Great Britain and Ireland.

IV.

That on the 19th day of February, 1917, at the said City and County of San Francisco, the plaintiff and the defendants executed and entered into a contract in writing in the words and figures following, to wit:

“San Francisco, California, U. S. A.
Feb. 19, 1917.

Larzelere, Sweeney Co.,
San Francisco.

Dear Sirs:

We hereby confirm the sale to you, through Mr. M. J. O'Reilly, of

75 (Seventy-five) tons of 2240 lbs. Crated
Brown Australian Onions
at the price of 4 (four) cents U. S. Currency per pound, landed on the Dock, duty paid, San Francisco.

Shipment to be effected from Australia by steamer on the 10th of March, 1917.

Quality of the onions delivered to the steamer in Australia to be guaranteed and a Certificate for same will be provided.

The Onions to be paid for by you in Cash on arrival in San Francisco.

This contract is of course subject to the usual clause exempting us from claims of any nature,

through non-fulfillment caused by conditions, over which we have no control. [2]

Yours faithfully,

For GEORGE WILLS & SONS, LTD.

A. H. ANDERSON,

Manager.

Accepted:

LARZELERE SWEENEY CO.”

V.

That on or about the 10th day of March, 1917, said 75 tons of crated brown Australian onions were shipped from Australia to San Francisco. That at the time of the delivery of said onions to the steamer in Australia said onions were of good quality and the said onions were then in good order and condition.

VI.

That on the 19th day of May, 1917, said 75 tons of crated brown Australian onions arrived in San Francisco, and thereupon plaintiff notified defendants of the arrival of the same; that plaintiff thereupon caused said onions to be landed on the dock and thereupon paid the duty thereon.

VII.

That on the 22d day of May, 1917, plaintiff offered in writing to deliver said onions to defendants upon payment of the purchase price thereof by defendants to plaintiff; that said offer in writing was delivered to defendants on the said 22d day of May, 1917, and was and is in words and figures following, to wit:

“San Francisco, May 22, 1917.

Larzelere Sweeney Company,
San Francisco, California.

Dear Sirs:

Referring to sale by us to you of 75 tons of 2240 lbs. crated Brown Australian Onions, as per our letter to you under date of February 19, 1917, and your written acceptance endorsed thereon: The property covered by this contract of sale has arrived in [3] San Francisco and is landed at the dock and duty is paid. We hereby offer to deliver to you the said property upon payment of the purchase price. We also offer to provide and deliver to you the certificate called for by said contract of sale.

Yours faithfully,
GEORGE WILLS & SONS, LTD.,
By A. H. ANDERSON,
Manager.”

VIII.

That defendants failed and refused to accept delivery of said onions; that defendants failed and refused to pay the purchase price thereof; that defendants never accepted delivery of said onions and never paid the purchase price thereof.

IX.

That thereafter, to wit, on or about the 26th day of May, 1917, plaintiff sold said 75 tons of brown Australian onions in the open market in San Francisco at the market price thereof; that plaintiff received as the purchase price at said sale the sum of Two Thousand Five Hundred and Seventy-

nine and 57/100 Dollars (\$2,579.57); that the expenses necessarily incurred by plaintiff in preparing said onions for sale amounted to the sum of Four Hundred and Six and 20/100 Dollars (\$406.20); that plaintiff paid as a commission to the broker who negotiated said sale for plaintiff a commission of one per cent (1%), which said commission amounted to the sum of Twenty-five and 79/100 Dollars (\$25.79); that said commission is the usual, customary and ordinary commission paid on such sales in the City and County of San Francisco; that said commission is the reasonable compensation of said broker for his services. That in order to effect said sale it was necessary to pay said commission to said broker. That after deducting the said expenses necessarily incurred by plaintiff in preparing said onions for sale and the said commission paid to said broker, plaintiff received as the net [4] proceeds of said sale the sum of Two Thousand One Hundred and Forty-seven and 57/100 Dollars (\$2,147.57). That by said contract set forth in paragraph IV of this complaint, the defendants agreed to pay to plaintiff the sum of Six Thousand Seven Hundred and Twenty Dollars (\$6,720.00) as the purchase price of said onions.

X.

That by reason of the said breach of said contract by defendants, plaintiff has been damaged in the sum of Four Thousand Five Hundred and Seventy-two and 43/100 Dollars (\$4,572.43); that prior to the commencement of this action plaintiff

demande of defendants that said defendants pay said sum of Four Thousand Five Hundred and Seventy-two and 43/100 Dollars (\$4,572.43) to plaintiff, but the defendants failed and refused to pay the same, or any part thereof; that defendants have not paid to plaintiff the said sum of Four Thousand Five Hundred and Seventy-two and 43/100 Dollars (\$4,572.43), or any part thereof.

WHEREFORE, plaintiff prays judgment against defendants for the sum of Four Thousand Five Hundred Seventy-two and 43/100 Dollars (\$4,572.43), together with interest thereon at the rate of seven per cent (7%) per annum, from the said 26th day of May, 1917; and plaintiff also prays judgment for its costs of suit.

ALFRED J. HARWOOD,
Attorney for Plaintiff.

Northern District of California,
City and County of San Francisco,—ss.

A. H. Anderson, being first duly sworn, deposes and says: That he is an officer of the plaintiff corporation, to wit, the assistant manager for California; that he makes this affidavit for and on behalf of said plaintiff; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge.

A. H. ANDERSON. [5]

Subscribed and sworn to before me this 2d day of August, 1917.

[Seal]

W. H. PYBURN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Aug. 2, 1917. Walter B. Maling, Clerk. [6]

(Title of Court and Cause.)

Appearance of Defendants.

William R. Larzelere and Joseph J. Sweeney, copartners doing business under the firm name of Larzelere, Sweeney Company, named as defendants in the above-entitled action in the complaint herein, hereby appear in the above-entitled cause by the undersigned, their attorneys.

Dated August 3d, 1917.

CHARLES W. SLACK,
CHAUNCEY S. GOODRICH and
ALFRED T. CLUFF,

Attorneys for Defendants.

Due service and receipt of a copy of the within appearance is hereby admitted this 4th day of August, 1917.

ALFRED J. HARWOOD,
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 4, 1917. Walter B. Maling, Clerk. [7]

(Title of Court and Cause.)

Demurrer to Complaint.

Now come defendants and demur to the complaint of the plaintiff herein on the following grounds, to wit:

I.

That the said complaint does not state facts sufficient to constitute a cause of action.

II.

That the said complaint does not state facts sufficient to constitute a cause of action against these defendants, or either of them.

III.

That the said complaint is uncertain in that it does not appear therein, nor can it be ascertained therefrom when the seventy-five tons of crated, brown Australian onions, mentioned in the contract set forth in paragraph IV of the said complaint were shipped from Australia to San Francisco.

IV.

That the said complaint is ambiguous in the particular in which it is hereinabove stated to be uncertain.

V.

That the said complaint is unintelligible in the particular in which it is hereinabove stated to be uncertain.

WHEREFORE defendants pray that they may be hence dismissed with their costs.

CHARLES W. SLACK,
CHAUNCEY S. GOODRICH and
ALFRED T. CLUFF,

Attorneys for Defendants.

[Endorsed]: Filed Aug. 23, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

At a stated term, to wit, the July term, A. D. 1917, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the Courtroom in the City and County of San Francisco, on Monday, the 24th day of September, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable WILLIAM H. SAWTELLE, District Judge for the District of Arizona, designated to hold and holding this Court.

(Title of Court and Cause.)

Order Overruling Demurrer.

Defendants' demurrer to the complaint came on to be heard and after arguments being submitted and fully considered, it was ordered that said demurrer be and the same is hereby overruled. [9]

(Title of Court and Cause.)

(Stipulation that Plaintiff may Amend Its Complaint.)

IT IS HEREBY STIPULATED that the plaintiff may amend its complaint herein in such particulars as its counsel may advise.

Dated: November 2d, 1917.

CHARLES W. SLACK,
CHAUNCEY S. GOODRICH and
ALFRED T. CLUFF,

Attorneys for Defendants.

The foregoing stipulation is hereby approved.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Nov. 8, 1917. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[10]

(Title of Court and Cause.)

Amendment to Complaint.

Now comes the plaintiff in the above-entitled action, and, by leave of Court first had and obtained, makes and files the following amendment to its complaint on file herein:

I.

Said complaint is hereby amended by striking therefrom all of the allegations contained in paragraph V of the original complaint herein, and by inserting in lieu thereof the following:

“V. That on the 26th day of February, 1916, plaintiff’s agents in Australia booked and reserved space for the shipment, on the steamer ‘Wattotara’ of the Union Steamship Company of New Zealand, of said 75 tons of crated brown Australian onions from Melbourne, Australia, to San Francisco; that prior to the 10th day of March, 1917, at Melbourne, Australia, plaintiff caused said 75 tons of crated brown Australian onions to be delivered to the Union Steamship Company of New Zealand, Limited, the owners of the steamer ‘Wattotara,’ for shipment by said steamer to San Francisco. That

when said space was reserved and said onions delivered, as aforesaid, said steamer was listed and scheduled to sail on March 10, 1917, direct from Melbourne to San Francisco. That through no fault of plaintiff, said steamer 'Wattotara' did not sail from Melbourne until March 16, 1917, and through no fault of plaintiff said steamer did not proceed direct from Melbourne to San Francisco, but proceeded to San Francisco by way of Vancouver, British Columbia; that plaintiff had no control over the sailing time of said steamer, nor did plaintiff have any control over the route which said steamer should take in sailing from Melbourne to San Francisco; that the time of the departure of said steamer from Melbourne and the route taken by said steamer [11] were determined and fixed by the said owners of said steamer. That the bill of lading covering said shipment, as well as all other bills of lading, issued by the owners of said steamer, contained the following provision:

"2. Steamer to have leave to deviate from any advertised route and to touch and stay at other Ports or places (although in a contrary direction to, or out of, or beyond, the ordinary or usual route to the port of discharge) once or oftener, in any order, backwards or forwards, for loading and/or discharging passengers and/or cargo and/or mails, or for any purpose of what kind soever, also to tow and assist vessels in all situations and to sail with or without Pilots."

That the bills of lading issued by all steamship owners operating steamers between Australian ports and ports in the United States of America contain provisions substantially similar to the said provision hereinabove set forth. That neither plaintiff nor its agents had knowledge, prior to March 14, 1917, that said steamer 'Wattotara' would proceed to San Francisco by way of Vancouver; that at all times prior to said 14th day of March, 1917, plaintiff and its agents believed that said steamer would sail direct from Melbourne to San Francisco. That no steamer other than said 'Wattotara' sailed from Melbourne to San Francisco between the 9th day of March, 1917, and the 17th day of March, 1917. That at the time of the delivery of said onions to the steamer in Australia, as aforesaid, said onions were of good quality and the said onions were then in good order and condition."

WHEREFORE plaintiff prays as it has prayed in its complaint herein.

ALFRED J. HARWOOD,
Attorney for Plaintiff. [12]

Northern District of California,
City and County of San Francisco,—ss.

A. H. Anderson, being first duly sworn, deposes and says: That he is an officer of the plaintiff corporation, to wit, the assistant manager for California; that he makes this affidavit for and on behalf of said plaintiff; that he has read the foregoing amendment to complaint, and knows the

contents thereof, and that the same is true of his own knowledge.

A. H. ANDERSON,

Subscribed and sworn to before me this 7th day of November, 1917.

[Seal]

W. H. PYBURN.

Notary Public in and for the City and County of San Francisco, State of California.

Service and receipt of a copy of the within amendment to complaint is hereby admitted this 5th day of November, 1917.

CHARLES W. SLACK,
CHAUNCEY S. GOODRICH and
ALFRED T. CLUFF,

Attorneys for Defendants.

[Endorsed]: Filed Nov. 8, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [13]

(Title of Court and Cause.)

Demurrer to Complaint as Amended.

Now come the defendants and demur to the complaint as amended of the plaintiff herein on the following grounds:

I.

That the said complaint as amended does not state facts sufficient to constitute a cause of action.

II.

That the said complaint as amended does not

state facts sufficient to constitute a cause of action against these defendants, or either of them.

III.

That the said complaint as amended is uncertain, nor does it appear therein, nor can it be *ascertain* therefrom, when the seventy-five (75) tons of crated brown Australian onions, mentioned in the contract set forth in paragraph IV of the said complaint as amended, were shipped from Australia to San Francisco.

IV.

That the said complaint as amended is ambiguous in the particular in which it is hereinabove stated to be uncertain.

V.

That the said complaint as amended is unintelligible in the particular in which it is hereinabove stated to be uncertain.

WHEREFORE, defendants pray that they be hence dismissed with their costs.

CHARLES W. SLACK,
CHAUNCEY S. GOODRICH and
ALFRED T. CLUFF,

Attorneys for Defendants.

Due service and receipt of a copy of the within demurrer is hereby admitted this 30th day of November, 1917.

ALFRED J. HARWOOD,
Attorney for Plaintiff. [14]

[Endorsed]: Filed Nov. 30, 1917. W. B. Maling,
Clerk. [15]

(Title of Court and Cause.)

Notice of Motion to Strike Out Portions of Complaint as Amended.

To George Wills & Sons, Limited, a Corporation,
the Above-named Plaintiff, and to Alfred J.
Harwood, Its Attorney:

You are hereby notified that on Monday, the 10th day of December, 1917, at the hour of 10 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, the above-named defendants will move the above-entitled court, at the courtroom thereof, in the United States Post Office Building, situated on the northeast corner of Seventh and Mission Streets, in the City and County of San Francisco, State of California, for an order striking out the following portions of the complaint as amended herein:

I.

All that portion of paragraph V of the said complaint as amended from the beginning thereof to and including the words "that no steamer other than said 'Waitotara' sailed from Melbourne to San Francisco between the 9th day of March, 1917, and the 17th day of March, 1917," in line 27, page 2, of the amendment to the said complaint.

II.

All that portion of paragraph IX of the said complaint as amended, commencing with the words "that the expenses necessarily incurred by plaintiff in preparing said onions for sale," in line 12,

page 4, of the said complaint, to and including the words "that in order to effect said sale it was necessary to pay said commission to said broker," in line 22, page 4, of the said complaint.

The said motion will be made upon the ground that the said [16] matters sought to be struck out consist of irrelevant matter, and will be based upon this notice and all of the pleadings, records, papers and files herein.

Dated this 30th day of November, 1917.

CHARLES W. SLACK,
CHAUNCEY S. GOODRICH and
ALFRED T. CLUFF,

Attorneys for Defendants.

Due service and receipt of a copy of the within Notice of Motion is hereby admitted this 30th day of November, 1917.

ALFRED J. HARWOOD,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 30, 1917. W. B. Maling,
Clerk. [17]

At a stated term, to wit, the November term, A. D. 1917, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 18th day of February, in the year of our Lord one thousand nine hundred and eighteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

(Title of Court and Cause.)

(Order Overruling Demurrer to Amended Complaint.)

Defendants' demurrer to amended complaint and motion to strike out parts of amended complaint came on to be heard and after arguments was submitted and it was ordered that said demurrer be overruled and said motion denied. [18]

(Title of Court and Cause.)

Answer to Complaint as Amended.

The above-named defendants, for their answer to the complaint herein of the plaintiff as amended, state, deny and allege as follows:

I.

That as to the allegations of paragraph V of the said complaint as amended, "That on the 26th day of February, 1916, plaintiff's agents in Australia booked and reserved space for the shipment, on the steamer 'Wattotara' of the Union Steamship Company of New Zealand, of said 75 tons of crated brown Australian onions from Melbourne, Australia, to San Francisco; that prior to the 10th day of March, 1917, at Melbourne, Australia, plaintiff caused said 75 tons of crated brown Australian onions to be delivered to the Union Steamship Company of New Zealand, Limited, the owners of the steamer 'Wattotara,' for shipment by said steamer to San Francisco; that when said space was re-

served and said onions delivered, as aforesaid, said steamer was listed and scheduled to sail on March 10, 1917, direct from Melbourne to San Francisco; that through no fault of plaintiff, said steamer 'Wattotara' did not said from Melbourne until March 16, 1917"; "that the bill of lading covering said shipment, as well as all other bills of lading, issued by the owners of said steamer, contained the following provision:

'2. Steamer to have leave to deviate from any advertised route and to touch and stay at other Ports or places (although in a contrary direction to, or out of, or beyond, the ordinary or usual route to the port of discharge) once or oftener, in any order, [19] backwards or forwards, for loading and/or discharging passengers and/or cargo and/or mails, or for any purpose of what kind soever, also to tow and assist vessels in all situations and to sail with or without Pilots';

that the bills of lading issued by all steamship owners operating steamers between Australian ports and ports in the United States of America contain provisions substantially similar to the said provisions hereinabove set forth"; "that at the time of the delivery of said onions to the steamer in Australia, as aforesaid, said onions were of good quality and the said onions were then in good order and condition"; the defendants state that they have no information or belief upon the subject of the said allegations sufficient to enable them to answer the same, and placing their denial thereof on that

ground, they deny each and all and every part of the said allegations.

II.

The defendants deny, according to their information and belief, that neither the plaintiff nor its agents had knowledge, prior to the 14th day of March, 1917, that the Steamer "Wattotara," mentioned in the said complaint as amended, would proceed to San Francisco by way of Vancouver; and deny, according to their information and belief, that at all or any times prior to the said 14th day of March, 1917, the plaintiff and its agents, or any of them, believed that the said steamer would sail direct from Melbourne to San Francisco; and in this connection the defendants allege that they are informed and believe, and according to such information and belief allege the facts to be, that the plaintiff and its agents knew, or by the exercise of reasonable diligence might have known, prior to the said 14th day of March, 1917, and also prior to the 10th day of March, 1917, [20] and also prior to the delivery by the plaintiff of the said onions at Melbourne for shipment to San Francisco, that the said steamer would not sail direct from Melbourne to San Francisco but would sail from Melbourne to San Francisco by a circuitous route, and that in consequence delivery of the said onions by the plaintiff to the defendants might be unreasonably delayed.

III.

That as to the allegations of paragraph IX of the said complaint as amended, "That thereafter, to

wit, on or about the 26th day of May, 1917, plaintiff sold said 75 tons of brown Australian onions in the open market in San Francisco at the market price thereof; that plaintiff received as the purchase price at said sale the sum of Two Thousand Five Hundred and Seventy-nine and 57/100 Dollars (\$2,579.57); that the expenses necessarily incurred by plaintiff in preparing said onions for sale amounted to the sum of Four Hundred and Six and 20/100 Dollars (\$406.20); that plaintiff paid as a commission to the broker who negotiated said sale for plaintiff a commission of one per cent (1%), which said commission amounted to the sum of Twenty-five and 79/100 Dollars (\$25.79); that said commission is the usual, customary and ordinary commission paid on such sales in the City and County of San Francisco; that said commission is the reasonable compensation of the said broker for his services; that in order to effect said sale it was necessary to pay said commission to said broker; that after deducting the said expenses necessarily incurred by plaintiff in preparing said onions for sale and the said commssion paid to said broker, plaintiff received as the net proceeds of said sale the sum of Two Thousand One Hundred and Forty-seven and 57/100 Dollars (\$2,147.57)''; the defendants state that they have no information or belief upon the subject of the said allegations sufficient to enable them to answer the same, and placing their denial thereof on that ground, they deny each and all and every part of the said allegations. [21]

IV.

The defendants deny, except as hereinafter otherwise alleged, that by the said contract set forth in paragraph IV of the said complaint as amended, the defendants agreed to pay to the plaintiff the sum of \$6,720 as the purchase price of the said onions; and allege, in this connection, that the defendants agreed to pay to the plaintiff for the said onions the price stipulated in the said contract to be paid by them on the performance only by the plaintiff of the conditions set forth in the said contract to be performed by the plaintiff, and on the performance only by the plaintiff of the further condition to be performed by the plaintiff that the said onions should be shipped by the plaintiff from Australia to San Francisco by the most direct steamship line operating between Australia and San Francisco; and further allege in this connection that the plaintiff did not ship the said onions from Australia to San Francisco until the 16th day of March, 1917; that at the time the said contract was entered into there was and had been for a long time prior thereto a general and well-established and well-known custom existing in San Francisco among dealers in onions at that place that onions sold in San Francisco to be shipped from Australia to San Francisco should be shipped by the most direct steamship lines operating between Australia and San Francisco, and it was understood and agreed between the plaintiff and the defendants at the time the said contract was entered into that shipment of the said onions was to be made by the plaintiff from Australia to

San Francisco by the most direct steamship line operating between Australia and San Francisco; that contrary to the said custom and to the said understanding and agreement, the plaintiff did not ship the said onions by the most direct steamship line operating between Australia and San Francisco, but shipped the said onions by the said Steamer "Wattotara"; that as the defendants are informed and believe, and according to such [22] information and belief allege the facts to be that plaintiff knew, or by the exercise of reasonable diligence might have known, at the time of the said shipment, that the said steamer "Wattotara" was a so-called "tramp" steamer having no regular ports of call, and that the said steamer would not sail direct from Australia to San Francisco but would sail from Australia to San Francisco by the circuitous route hereinafter alleged; that as the defendants are informed and believe, and according to such information and belief allege the facts to be, the said steamer sailed on the 16th day of March, 1917, from Melbourne, Australia, to Sydney, Australia, thence to Wellington, New Zealand, thence to Vancouver, British Columbia, and thence to San Francisco, and arrived in the port of San Francisco on the 19th day of May, 1917; that during all the times herein mentioned, as the plaintiff well knew, the most direct steamship line operating between Australia and San Francisco was the line of the Oceanic Steamship Company; that had the plaintiff shipped the said onions by the said most direct steamship line operating between Australia and

San Francisco the said onions would have arrived in San Francisco on the 9th day of April, 1917; that the fair market price in San Francisco on the said 9th day of April, 1917, of onions of the kind and quality mentioned in the said contract was seven and one-half ($7\frac{1}{2}$) cents per pound; that the fair market price in San Francisco on the said 19th day of May, 1917, of onions of the kind and quality mentioned in the said contract was two (2) cents per pound; and that the difference between the said prices on the two last mentioned dates was due to the fact that the crop of onions in California for the season of 1917 was not in market in San Francisco on the said 9th day of April, 1917, but was in market in San Francisco on the 1st day of May, 1917, and thereafter during the month of May, 1917. [23]

V.

The defendants deny that there was any breach of the said contract by the defendants as alleged in the said complaint as amended; and deny that the plaintiff has been damaged in the sum of \$4,572.43, or in any other sum.

Further answering the said complaint, and by way of counterclaim, the defendants allege:

I.

That on the 19th day of February, A. D. 1917, the plaintiff and the defendants entered into the contract in writing set forth in the said complaint; that at the time the said contract was entered into there was and had been for a long time prior thereto a general and well-established and well known cus-

tom existing in San Francisco among dealers in onions at that place that onions sold in San Francisco to be shipped from Australia to San Francisco should be shipped by the most direct steamship line operating between Australia and San Francisco; and that it was understood and agreed between the plaintiff and the defendants at the time the said contract was entered into that shipment of the said onions was to be made by the plaintiff from Australia to San Francisco by the most direct steamship line operating between Australia and San Francisco.

II.

That contrary to the said custom, and to the said understanding and agreement, the plaintiff failed and neglected to ship the said onions by the most direct steamship line operating between Australia and San Francisco; that by reason of the said failure to ship by the said most direct steamship line the said onions did not arrive in San Francisco until the 19th day of May, 1917; that had the plaintiff shipped the said onions by the said most direct steamship [24] line operating between Australia and San Francisco the said onions would have arrived in San Francisco on the 9th day of April, 1917; that the fair market price in San Francisco on the said 9th day of April, 1917, of onions of the kind and quality mentioned in the said contract was seven and one-half ($7\frac{1}{2}$) cents per pound; and that the fair market price in San Francisco on the said 19th day of May, 1917, of onions of the kind and quality

mentioned in the said contract was two (2) cents per pound.

III.

That by reason of the failure of the plaintiff to ship the said onions by the most direct steamship line operating between Australia and San Francisco the defendants suffered in damages in the sum of six thousand three hundred dollars (\$6,300).

WHEREFORE, the defendants pray that the plaintiff take nothing by reason of its said action, and that the defendants have judgment against the plaintiff in the sum of six thousand three hundred dollars (\$6,300), with interest thereon from the said 9th day of April, A. D. 1918, at the rate of seven (7) per cent per annum, and for their costs of suit.

CHARLES W. SLACK,
CHAUNCEY S. GOODRICH and
ALFRED T. CLUFF,
Attorneys for Defendants.

State of California,
City and County of San Francisco,—ss.

William R. Larzelere, being first duly sworn, deposes and says:

That he is one of the defendants named in the foregoing answer; that he has read the said answer and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be [25] true.

WILLIAM R. LARZELERE.

Subscribed and sworn to before me this 15th day of July, A. D. 1918.

[Seal] CHARLES EDELMAN,
Notary Public in and for the City and County,
of San Francisco, State of California.

My commission expires April 7, 1922.

Service of the within answer is hereby admitted this 17th day of July, 1918.

ALFRED J. HARWOOD,
Attorney for Plaintiff.

[Endorsed]: Filed Jul. 18, 1918. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [26]

(Title of Court and Cause.)

Waiver of Jury Trial.

The parties to the above-entitled action hereby waive a jury trial.

Dated: February 18th, 1922.

ALFRED J. HARWOOD,
Attorney for Plaintiff.

CHARLES W. SLACK and
EDGAR T. ZOOK,

Attorneys for Defendants.

[Endorsed]: Filed Feb. 18, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [27]

At a stated term, to wit, the March term, A. D. 1922, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Wednesday, the 3d day of May, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,090.

GEORGE WILLS & SONS, LTD.,

vs.

WILLIAM R. LARZELERE et al.

(Order Granting Motion for Nonsuit, etc.)

This cause came on regularly this day for trial before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation filed; Alfred J. Harwood, Esq., appearing as attorney for plaintiff and Edgar T. Zook, Esq., appearing as attorney for defendants. By consent it is ordered that plaintiff may file its re-engrossed amended complaint. Mr. Harwood made the opening statement on behalf of plaintiff and counsel orally stipulated to certain facts. Plaintiff introduced in evidence the depositions of Francis A. Drake and Mark F. Shea; and introduced in evidence and filed its exhibits marked "1" and "2"; and A. A. Anderson was sworn and testified

on behalf of plaintiff. Plaintiff rested. Defendants moved for a nonsuit on the grounds stated and after arguments the motion was submitted and being fully considered it was ordered that said motion be and is hereby granted and that a judgment of nonsuit, with costs to the defendants, be entered herein; to which ruling the plaintiff duly excepted. [28]

(Title of Court and Cause.)

Amended Complaint (Re-Engrossed).

Now comes George Wills & Sons, Limited, a corporation, duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, and lawfully transacting business in the State of California, and in the City and County of San Francisco in the Southern Division of the Northern District thereof, and complains of the defendants, William R. Larzelere and Joseph J. Sweeney, copartners doing business under the firm name of Larzelere, Sweeney Company, and for cause of action alleges:

I.

That plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland; and at all of said times was lawfully transacting business in the City and County of San Francisco, in the Southern Division of the Northern District of California.

II.

That defendants are, and at all times herein mentioned were, copartners doing business under the firm name of Larzelere, Sweeney Company; that each of said defendants is, and at all times herein mentioned was, a citizen and resident of the State of California.

III.

That the amount in controversy in this suit exceeds, exclusive of interest and costs, the sum or value of Three Thousand dollars (\$3,000); that this suit is between citizens of the State of California and a citizen and subject of a foreign State, viz., the United Kingdom of Great Britain and [29] Ireland.

IV.

That on the 19th day of February, 1917, at the said City and County of San Francisco, the plaintiff and the defendants executed and entered into a contract in writing in the words and figures following, to wit:

“San Francisco, California, U. S. A.

Feb. 19, 1917.

Larzelere, Sweeney Co.,

San Francisco.

Dear Sirs:

We hereby confirm the sale to you, through Mr. M. J. O'Reilly, of

75 (Seventy-five) tons of 2240 lbs. Crated

Brown Australian Onions

at the price of 4 (four) cents U. S. currency per

pound, landed on the Dock, duty paid, San Francisco.

Shipment to be effected from Australia by steamer on the 10th of March, 1917.

Quality of the Onions delivered to the steamer in Australia to be guaranteed and a Certificate for same will be provided.

The Onions to be paid for by you in Cash on arrival in San Francisco.

This Contract is of course subject to the usual clause exempting us from claims of any nature, through nonfulfillment caused by conditions, over which we have no control.

Yours faithfully,

For GEORGE WILLS & SONS, LTD.

A. H. ANDERSON,

Manager.

Accepted:

LARZELERE SWEENEY CO." [30]

V.

That on the 26th day of February, 1916, plaintiff's agents in Australia booked and reserved space for the shipment, on the steamer "Waitotara" of the Union Steamship Company of New Zealand, of said 75 tons of crated brown Australian onions from Melbourne, Australia, to San Francisco; that prior to the 10th day of March, 1917, at Melbourne, Australia, plaintiff caused said 75 tons of crated brown Australian onions to be delivered to the Union Steamship Company of New Zealand, Limited, the owners of the steamer "Waitotara," for shipment by said steamer to San Francisco. That

when said space was reserved and said onions delivered, as aforesaid, said steamer was listed and scheduled to sail on March 10, 1917, direct from Melbourne to San Francisco. That through no fault of plaintiff, said steamer "Waitotara" did not sail from Melbourne until March 16, 1917, and through no fault of plaintiff said steamer did not proceed direct from Melbourne to San Francisco, but proceeded to San Francisco by way of Vancouver, British Columbia; that plaintiff had no control over the sailing time of said steamer, nor did plaintiff have any control over the route which said steamer should take in sailing from Melbourne to San Francisco; that the time of the departure of said steamer from Melbourne and the route taken by said steamer were determined and fixed by the said owners of said steamer. That the bill of lading covering said shipment, as well as all other bills of lading, issued by the owners of said steamer, contained the following provision:

"2. Steamer to have leave to deviate from any advertised route and to touch and stay at other Ports or places (although in a contrary direction to, or out of, or beyond, the ordinary or usual route to the port of discharge) once or oftener, in any order, backwards or forwards, for loading and/or discharging passengers [31] and/or cargo and/or mails, or for any purpose of what kind soever, also to tow and assist vessels in all situations and to sail with or without Pilots."

That the bills of lading issued by all steamship owners operating steamers between Australian ports and the ports in the United States of America contain provisions substantially similar to the said provisions hereinabove set forth. That neither plaintiff nor its agents had knowledge, prior to March 14th, 1917, that said steamer "Waitotara" would proceed to San Francisco by way of Vancouver; that at all times prior to said 14th day of March, 1917, plaintiff and its agents believed that said steamer would sail direct from Melbourne to San Francisco. That no steamer other than said "Waitotara" sailed from Melbourne to San Francisco between the 9th day of March, 1917, and the 17th day of March, 1917. That at the time of the delivery of said onions to the steamer in Australia, as aforesaid, said onions were of good quality and the said onions were then in good order and condition. That said onions were loaded on board said steamer before the 10th day of March, 1917.

VI.

That on the 19th day of May, 1917, said 75 tons of crated brown Australian onions arrived in San Francisco, and thereupon plaintiff notified defendants of the arrival of the same; that plaintiff thereupon caused said onions to be landed on the dock and thereupon paid the duty thereon.

VII.

That on the 22d day of May, 1917, plaintiff offered in writing to deliver said onions to defendants upon payment of the purchase price thereof by defendants to plaintiff; that said offer in writ-

ing was delivered to defendants on the said 22d day of May, 1917, and was and is in words and figures following, to wit: [32]

“San Francisco, May 22, 1917.

Larzelere Sweeney Company,
San Francisco, California.

Dear Sirs:

Referring to sale by us to you of 75 tons of 2240 lbs. crated brown Australian Onions, as per our letter to you under date of February 19, 1917 and your written acceptance endorsed thereon: The property covered by this contract of sale has arrived in San Francisco and is landed at the dock and duty is paid. We hereby offer to deliver to you the said property upon payment of the purchase price. We also offer to provide and deliver to you the certificate called for by said contract of sale.

Yours faithfully,
GEORGE WILLS & SONS, LTD.,
By A. H. ANDERSON,
Manager.”

VIII.

That defendants failed and refused to accept delivery of said onions; that defendants failed and refused to pay the purchase price thereof; that defendants never accepted delivery of said onions and never paid the purchase price thereof.

IX.

That thereafter, to wit, on or about the 26th day of May, 1917, plaintiff sold the 75 tons of brown Australian onions in the open market in San Fran-

cisco at the market price thereof; that plaintiff received as the purchase price at said sale the sum of Two Thousand Five Hundred and Seventy-nine and 57/100 Dollars (\$2,579.57); that the expenses necessarily incurred by plaintiff in preparing said onions for sale amounted to the sum of Four Hundred and Six and 20/100 Dollars (\$406.20); that plaintiff paid as a commission to the broker who negotiated said sale for plaintiff [33] a commission of one per cent (1%), which said commission amounted to the sum of Twenty-five and 79/100 Dollars (\$25.79); that said commission is the usual, customary and ordinary commission paid on such sales in the City and County of San Francisco; that said commission is the reasonable compensation of said broker for his services. That in order to effect said sale it was necessary to pay said commission to said broker. That after deducting the said expenses necessarily incurred by plaintiff in preparing said onions for sale and the said commission paid to said broker, plaintiff received as the net proceeds of said sale the sum of Two Thousand One Hundred and Forty-seven and 57/100 Dollars (\$2,147.57). That by said contract set forth in Paragraph IV of this complaint, the defendants agreed to pay to plaintiff the sum of Six Thousand Seven Hundred and Twenty Dollars (\$6,720.00) as the purchase price of said onions.

X.

That by reason of the said breach of said contract by defendants, plaintiff has been damaged in the sum of Four Thousand Five Hundred and Sev-

enty-two and 43/100 Dollars (\$4,572.43); that prior to the commencement of this action plaintiff demanded of defendants that said defendants pay said sum of Four Thousand Five Hundred and Seventy-two and 43/100 Dollars (\$4,572.43) to plaintiff, but that defendants failed and refused to pay the same, or any part thereof; that defendants have not paid to plaintiff the said sum of Four Thousand Five Hundred and Seventy-two and 43/100 Dollars (\$4,572.43), or any part thereof.

WHEREFORE, plaintiff prays judgment against defendants for the sum of Four Thousand Five Hundred Seventy-two and 43/100 Dollars (\$4572.-43), together with interest thereon at the rate of seven per cent (7%) per annum, from the said 26th day of May, 1917; and plaintiff also prays judgment for its costs of suit.

ALFRED J. HARWOOD,

Attorney for Plaintiff. [34]

Northern District of California,
City and County of San Francisco,—ss.

A. H. Anderson, being first duly sworn, deposes and says: That he is an officer of the plaintiff corporation, to wit, the assistant manager for California; that he makes this affidavit for and on behalf of said plaintiff; that he has read the foregoing amended complaint and knows the contents thereof, and that the same is true of his own knowledge.

A. H. ANDERSON.

Subscribed and sworn to before me this 29 day of April, 1922.

[Seal]

E. M. CLARK,

Notary Public, in and for the City and County of San Francisco, State of California.

Service of the within amended complaint as re-engrossed is hereby admitted this 1st day of May 1922.

CHARLES W. SLACK, and

EDGAR T. ZOOK,

Attorneys for Defendants.

[Endorsed]: Filed May 3d, 1922. Walter B. Maling, Clerk. [35]

(Title of Court and Cause.)

Judgment of Nonsuit.

This cause having come on regularly for trial on the 3d day of May, 1922, before the Court sitting without a jury, a trial by jury having been waived by written stipulation filed; Alfred J. Harwood, Esq., appearing as attorney for plaintiff and Edgar T. Zook, Esq., appearing as attorney for the defendants; and the trial having been proceeded with and evidence having been introduced on behalf of plaintiff and the attorney for the defendants having, at the close of plaintiff's case, moved the Court for a judgment of nonsuit and the Court, after due consideration, having ordered that said motion be granted and that a judgment of nonsuit be entered herein with costs to the defendants:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action; that judgment of nonsuit be and the same is hereby entered against said plaintiff herein; that defendants go hereof without day and that said defendants do have and recover of and from said plaintiff their costs herein expended taxed at \$40.55.

Judgment entered May 3, 1922.

WALTER B. MALING,
Clerk.

A true copy.

[Seal] Attest: WALTER B. MALING,
Clerk.

[Endorsed]: Filed May 3, 1922. Walter B. Maling, Clerk. [36]

(Title of Court and Cause.)

(Clerk's Certificate to Judgment-Roll.)

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 3d day of May 1922.

[Seal] WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed May 3, 1922. Walter B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[37]

In the Southern Division of the District Court of
the United States in and for the Northern Dis-
trict of California, Second Division.

No. 16,090.

GEORGE WILLS & SONS, LIMITED, a Corpora-
tion,

Plaintiff,

vs.

WILLIAM R. LARZELERE and JOSEPH J.
SWEENEY, Copartners, Doing Business
Under the Firm Name of LARZELERE,
SWEENEY COMPANY,

Defendants.

Plaintiff's Bill of Exceptions.

BE IT REMEMBERED that the above-entitled
cause came duly on for trial on the 3d day of May,
1922, before Honorable William C. Van Fleet,
Judge of the above-entitled court, sitting without a
jury (a jury having been waived by stipulation of
the parties in writing), Alfred J. Harwood, Esq.,
appearing as attorney for the plaintiff, and Messrs.
Charles W. Slack, Edgar T. Zook and A. T. Cluff,
appearing as attorneys for the defendants, where-
upon the following proceedings were had:

Mr. HARWOOD.—If the Court please, certain of
the facts in this case have been stipulated to, and

pursuant to a trial stipulation entered into between the parties it has been stipulated that the following facts which I will read are deemed to be true, and that no evidence thereof need be offered by either party: "That on or about May 26th, 1917, plaintiff sold the said shipment of brown Australian Onions (crated) (referred to in the complaint), in the open market in San Francisco for the sum of [38] Two Thousand Five Hundred and Seventy-nine and 57/100 Dollars (\$2,579.57); that the said price was the reasonable market value of the said onions in their then condition on said date; that plaintiff paid as a commission to the broker who negotiated said sale for plaintiff a commission of one per cent (1%), which said commission amounted to the sum of Twenty-five and 79/100 Dollars (\$25.79); that said commission is the usual, customary and ordinary commission paid on such sales in the City and County of San Francisco; that said commission is the reasonable compensation of said broker for his services. That in order to effect said sale it was necessary to pay said commission to said broker. That after deducting the said commission paid to said broker, plaintiff received as the net proceeds of said sale the sum of Two Thousand Five Hundred and Fifty-three and 78/100 Dollars (\$2,553.78)." That is stipulated to, Mr. Zook?

Mr. ZOOK.—Yes, that is stipulated to without objection. Some of these facts are stipulated to subject to their materiality and relevancy, but as to these facts there is no objection made.

Mr. HARWOOD.—It also has been stipulated that the bills of lading issued in 1916, and 1917, by the Oceanic Steamship Company, (which Company operates a line of steamers between Australia and San Francisco) contain a clause providing that the steamship company shall have the right “to lighter from steamer to steamer and from steamer to shore, and to touch at port or ports, in any order of rotation without being deemed a deviation.” That is also admitted?

Mr. ZOOK.—The fact is admitted, but I would like to reserve my objection to that until an additional fact is read and make my objection to it at that time. [39]

The COURT.—The fact that there was such a clause in the bills of lading of the Oceanic Steamship Company is admitted, but its materiality is reserved.

Mr. ZOOK.—Yes, your Honor. All of these facts are admitted to be facts.

Mr. HARWOOD.—Therefore, if your Honor please, the stipulation which I have read, or, rather, the facts which have been agreed to in conjunction with the answer prove all of the allegations of the complaint, as I see it, with the exception of the allegations in Paragraph 5 of the amended complaint, and they are to be proved by depositions.

**Deposition of Francis Archibald Drake, for
Plaintiff.**

The deposition of FRANCIS ARCHIBALD DRAKE was thereupon read in evidence as follows:

“Interrogatory No. 1. What is your name, residence and occupation?

(Deposition of Francis Archibald Drake.)

Ans. Francis Archibald Drake, Arncliffe N. S. W. Salesman.

Interrogatory No. 2. Referring to bill of lading handed you, please state if said bill of lading was ever in your possession? (Bill of Lading to be attached to deposition as an exhibit.)

Ans. Yes.

Interrogatory No. 3. From whom did you receive this bill of lading?

Ans. Messrs. Shea Hood & Co. of Melbourne who received the Bill of Lading from the Union Co. after putting the Onions aboard as our Shippers.

Interrogatory No. 4. Do you know when the space for this shipment of onions was booked or reserved with Union Steamship [40] Company of New Zealand, Ltd.?

Ans. Yes.

Interrogatory No. 5. If the answer to the preceding interrogatory was 'Yes,' please state when said space was booked.

Ans. February 26th, 1917.

Interrogatory No. 6. At the time this space was booked, for what voyage was the 'Waitotara' advertised or scheduled?

Ans. Our advice was that the 'Waitotara' was engaged to sail for San Francisco, and we knew of no extraordinary deviation."

Mr. ZOOK.—We object to that answer, if your Honor please, as hearsay, that is, that part of the answer reading: "And we knew of no extraordinary deviation."

(Deposition of Francis Archibald Drake.)

The COURT.—That part of the answer may go out as not responsive. I think the first part is fairly responsive. In transactions of that kind you are bound to take some things on representation. The latter part of the answer goes out because it is not responsive, it is purely a voluntary statement.

To said ruling of the Court plaintiff then and there duly excepted.

EXCEPTION No. 1.

“Interrogatory No. 7. Did you attend to the shipping of those onions?”

Ans. Shea Hood did the shipping under our directions through our agents—Messrs. H. Hecht & Co., Melbourne.

Interrogatory No. 8. When did you commence to deliver these onions to the steamer ‘Waitotara’?

Ans. According to advices—late in February.”
[41]

Mr. ZOOK.—We move that that answer be stricken out on the ground that it is based on hearsay.

Mr. HARWOOD.—We consent to that.

The COURT.—Let that answer be stricken out.

“Interrogatory No. 9. When was the delivery completed?”

Ans. According to advices March 7th.”

Mr. ZOOK.—The same objection.

The COURT.—That will be stricken out.

“Interrogatory No. 10. Before the completion of the delivery of the onions to the Steamer, had you been informed by Union Steamship Company of

(Deposition of Francis Archibald Drake.)

New Zealand, Ltd., or by anyone else, that the 'Waitotara' would not sail direct to San Francisco?

Ans. No.

Interrogatory No. 11. Before the completion of the delivery of the onions to the Steamer, had any one connected with the firm of George Wills & Company, Limited, to your knowledge, been informed that the 'Waitotara' would not sail direct to San Francisco?

Ans. No.

Interrogatory No. 12. When did you first learn that the 'Waitotara' would proceed to San Francisco via Vancouver?

Ans. Too late to divert owing to onions being already loaded. In fact the ship had sailed before I knew of the diversion.

Interrogatory No. 13. How and under what circumstances did you learn this?

Ans. As far as I recollect, direct from Union Steamship Company.

Interrogatory No. 14. At or before the time of the delivery of the onions to the steamer, did you know that the 'Waitotara' [42] would proceed to San Francisco via Vancouver?

Ans. No.

Interrogatory No. 15. To your knowledge, at or before the time of the delivery of the onions to the steamer, did anyone connected with George Wills & Sons, Limited, know that the 'Waitotara' would proceed to San Francisco via Vancouver?

Ans. Not to my knowledge.

(Deposition of Francis Archibald Drake.)

Interrogatory No. 16. When did you first learn that the 'Waitotara' would touch at Wellington and Sydney on its way to San Francisco?

Ans. Not until after ship had sailed.

Interrogatory No. 17. Were the onions delivered to the Union Steamship Company at the dock when you first received this information?

Ans. Yes, and ship had sailed. See previous answer above.

Interrogatory No. 18. After you learned that the 'Waitotara' would not proceed to San Francisco by a direct route, what, if any, efforts did you make to cancel the freight and to ship by another steamer? In answer to this question state fully what efforts were made and also state the result of such efforts.

Ans. See No. 17. Nothing could be done because ship had sailed.

Interrogatory No. 19. At the time the space for this shipment of onions was booked, when was the 'Waitotara' scheduled or listed to sail from Melbourne for San Francisco?

Ans. March 10th, 1917.

Interrogatory No. 20. When did the 'Waitotara' actually sail from Melbourne for San Francisco?

Ans. According to advices March 16th, 1917.
[43]

Interrogatory No. 21. Did any steamer other than the 'Waitotara' sail from Melbourne for San Francisco between March 9, 1917, and March 17, 1917?

Ans. Not to my knowledge.

(Deposition of Francis Archibald Drake.)

Interrogatory No. 22. At the time of the delivery of said onions to the 'Waitotara,' what was the condition of the onions?

Ans. First-class according to Government Grader's Certificate."

Mr. ZOOK.—I object to that, because the certificate speaks for itself. I ask that that be stricken out.

The COURT.—Yes, let that go out.

To said ruling counsel for plaintiff then and there duly excepted.

EXCEPTION No. 2.

"Interrogatory No. 23. At the time of the delivery of said onions to the 'Waitotara,' what was the quality of said onions?

Ans. Brown Spanish, and also see No. 22."

Mr. ZOOK.—I ask that that be stricken out, also, your Honor. It must necessarily be stricken out, because the previous answer was stricken out.

The COURT.—Yes.

To said ruling of the Court counsel for plaintiff then and there duly excepted.

EXCEPTION No. 3.

"Cross-Interrogatory No. 1. If your answer to direct interrogatory No. 4 is 'Yes,' state whether or not you know, of your own knowledge, when that space was booked or reserved. [44]

Ans. Yes. February 26, 1917.

Cross-Interrogatory No. 2. By whom was this space booked or reserved? If by yourself, with

(Deposition of Francis Archibald Drake.)

what officer, if any, of the Union Steamship Company, Ltd., did you discuss the matter?

Ans. Ourselves, 100 tons—Remainder Shea Hood & Co. Cannot say with what officer.

Cross-Interrogatory No. 3. By what means was the steamer 'Waitotara,' mentioned in direct interrogatory No. 6, advertised or scheduled for the voyage described by you?

Ans. Was not advertised to my knowledge. Was scheduled on regular listings.

Cross-Interrogatory No. 4. Do you understand by 'sailing direct to San Francisco' that the steamer would sail from Melbourne to San Francisco in the most direct line compatible with the proper navigation of the steamer and without touching at any intermediate or other ports on the way?

Ans. Yes that would be my understanding, but the shipping agents could divert under Bill of Lading clauses, notwithstanding a statement that a vessel was a direct steamer."

Mr. ZOOK.—I ask that the part of said answer after the word "understanding" be stricken out as the conclusion of the witness.

The COURT.—Yes, that is improper.

To said ruling of the Court in striking out said answer, counsel for plaintiff then and there duly excepted.

EXCEPTION No. 4.

"Cross-Interrogatory No. 5. What ports, if any, were you informed that the 'Waitotara' would visit

(Deposition of Francis Archibald Drake.)

upon this voyage from Melbourne [45] to San Francisco?

Ans. I was given to understand that it was a direct sailing to San Francisco.

Cross-Interrogatory No. 6. Did you make any inquiry of any of the officials of the Union Steamship Company, Ltd., before you commenced to deliver the onions covered by the bill of lading mentioned in Interrogatory No. 2 as to the time of departure or route to be followed by the 'Waitotara'?

Ans. Yes, I did make enquiry and was informed that the 'Waitotara' would sail on the 10th March from Melbourne to San Francisco as a direct steamer, which information it was necessary for me to ascertain in the first negotiating for the business."

Mr. ZOOK.—I ask that the part of said answer after the word "steamer" be stricken out as not responsive.

The COURT.—Let it go out. It is a mere interpolation of something not required in answering the interrogatory.

To said ruling of the Court, counsel for plaintiff then and there duly excepted.

EXCEPTION No. 5.

"Cross-Interrogatory No. 7. Did you make any such inquiry prior to the completion of delivery of the onions to the steamer?

Ans. No direct inquiry was made to the Company as to any alteration in the date of sailing

(Deposition of Francis Archibald Drake.)

between the date that the space was booked and the date of the completion of the delivery of the onions to this steamer, for having booked space on her we naturally did not think this was necessary, for it was fair to assume that as interested parties, the company would have [46] advised us, without application to them, if a serious alteration in the date of sailing or in the sailing route was made. We were never informed by the Company of any such alteration."

Mr. ZOOK.—I ask that all of that portion of the answer "having booked space on her we naturally did not think this was necessary, for it was fair to assume that as interested parties, the company would have advised us, without application to them, if a serious alteration in the date of sailing or in the sailing route was made," I ask that that be stricken out as argumentative.

The COURT.—It is not responsive.

Mr. HARWOOD.—But the latter part, "We were never informed by the company of any such alteration," that will remain in?

The COURT.—Yes, because that is a fact; the other is mere argument.

To the said ruling of the Court, counsel for plaintiff then and there duly excepted.

EXCEPTION No. 6.

"Cross-Interrogatory No. 8. Did you ever make any effort to ship these onions by the steamers of the Oceanic Line?

Ans. Yes, but could not get space.

(Deposition of Francis Archibald Drake.)

Cross-Interrogatory No. 9. Do you not know that the steamers of that line ply between Australia and San Francisco on a regular schedule over a regular route and do not deviate from that route except in the event of a great emergency?

Ans. Yes, we are in close touch with the Oceanic Company and keep posted on sailings. Since the outbreak of the European War the sailing dates of all steamers are merely tentative and are [47] liable to be changed upon very short notice.

Cross-Interrogatory No. 10. Are not the sailing dates and arrivals of the Oceanic Line Steamers and the route to be followed by them on each voyage advertised a year or more in advance of their sailing dates?

Ans. Whilst dates might be fixed as far as twelve months ahead no booking for space for anything like such a time would be made, but this is altogether outside the question, and has nothing whatever to do with the 'Waitotara' sailing which was a specific instance."

Mr. ZOOK.—That whole answer is not responsive to the question.

The COURT.—No, that is not responsive to the question, that will be stricken out.

To said ruling of said Court counsel for plaintiff then and there duly excepted.

EXCEPTION No. 7.

Counsel for plaintiff thereupon offered in evidence the bill of lading attached to said deposition of Francis Archibald Drake and said bill of lad-

ing was thereupon received and read in evidence, marked Plaintiff's Exhibit No. 1, and was and is in words and figures following, to wit: [48]

Plaintiff's Exhibit No. 1.

UNION STEAMSHIP COMPANY OF NEW ZEALAND, LIMITED.

Shipped in apparent good order and condition by GEO. WILLS & CO. LTD. on board the UNION STEAMSHIP COMPANY'S S. S. "WAITOTARA" whereof RITCHIE is Master, now lying in the Port of SYDNEY and bound for SAN FRANCISCO via intermediate Ports, Four thousand, four-hundred, and twenty-eight crates Onions (28 crates in dispute if on board to be delivered) being marked and numbered as in the margin, and to be delivered (subject to the exceptions and stipulations herein-after mentioned) in the like good order and condition, at the aforesaid Port of San Francisco unto Order or to assigns, freight for the said goods to become due on shipment and to be paid in cash without deduction.

SYDNEY TO
SAN FRAN-
CISCO

G. W.
S. F.

4428 crates
onions.

THE FOLLOWING ARE THE EXCEPTIONS AND STIPULATIONS REFERRED TO.

1. The Act of God, the King's Enemies, Pirates, Robbers or Thieves by land or sea, whether in the service of the Company or otherwise, Restraints of Princes, Rules or People, Restrictions and consequences of Quarantine, the Requirements of Mail Service, Riots, Strikes, or Lock-outs, or other La-

236 tons, 5
 cwt. 2 qrs.
 21 lbs. @
 91/—.
 £1075/1/9

bour Disturbances or delay caused directly or indirectly thereby, Fire afloat or ashore, Jettison, Barratry, Vermin, Collision or Stranding, and all Accidents, Loss or Damages whatsoever, from Machinery, Boilers or Steam, or from the neglect or default or error in judgment of Pilot, Master or Crew, or other servants or of the Agents of the Company, and all and every the Dangers and Accidents of the Seas, Rivers and Steam Navigation, of whatever nature or kind, are excepted.

2. Steamer to have leave to deviate from any advertised route and to touch and stay at other Ports or places (although in a contrary direction to, or out of, or beyond, the ordinary or usual route to the port of discharge) once or oftener, in any order, backwards or forwards, for loading and/or discharging passengers and/or cargo and/or mails, or for any purpose of what kind soever, also to tow and assist vessels in all situations and to sail with or without Pilots.

Freight
 £1075 1 9

payable at
 MEL-
 BOURNE

Freight, if pay-
 able at desti-
 nation in
 America, to
 be at the
 rate of \$5.00
 to the £1.

3. The Company does not guarantee the time of ship's arrival at or departure from any port, and will not hold itself responsible for the loss of or damage to goods lying on any wharf awaiting shipment, or after discharge from vessel's tackle. Consignees or their assigns must be ready to take delivery of goods as soon as the ship is ready to discharge them, otherwise the Company shall be at liberty to land or warehouse the goods, or discharge them into a store, ship, or hulk, or into lighters, or on a wharf, as customary, at the Shipper's risk and expense. Sorting charges, if any, to be borne

by consignee. Goods for any roadstead only received on the understanding that if deemed necessary by the Master to proceed on voyage without discharging the whole or any part of said goods, such overcarrying to be at the Shipper's risk.

4. The ship will not be responsible for correct delivery unless each package is distinctly, correctly and permanently marked by the Shipper before shipment, with a mark and number of address, and also with the name of the Port of delivery. [49]

5. The Company are to be at liberty to carry the goods to their Port of destination, by the within mentioned or other steamer or steamers, ship or ships, either belonging to themselves, or to the other persons, proceeding by and route, and whether directly or indirectly to such port, and in so doing to carry the goods beyond their Port of destination, and to tranship or land or store the goods either on shore or afloat and re-ship and forward the same at the Company's expense but at Shipper's risk.

6. The Company will not be responsible under any circumstances if goods or any portion of them be missed or lost, unless a claim be made on account thereof within seven days from the date the goods were landed, or should have been landed, if they prove missing, and it is agreed, that in settlement of any claim for loss of or damage to the goods, such claim shall be restricted to the cash value of the goods at the Port of discharge at the date of discharge, provided such value does not exceed the cash value at Shipping Port at the date of shipment

IMPORTANT:

Shippers consigning Goods or Merchandise "To Order," must, in order to avoid delay and expense at destination, indicate on the Captain's copy of This Bill of Lading (or by sealed cover addressed to the Company's Agent at San Francisco, attached to the Captain's copy of this Bill of Lading) the Person or Firm to be notified on arrival of the goods at destination.

with actual costs added, and in case of such excess to such last-mentioned cash value and costs.

7. Weight, measure, quality, contents and value unknown. The Company shall not be liable for rust, leakage, shrinkage, evaporation, explosion, stains, heat, sweat, decay, torn wrappers, broken cords or hoops; breakages of glass, chinaware, earthenware, stoves, grates, or any kind of cast iron packages, or other goods of a brittle or fragile nature, from whatsoever cause arising; loss or damage arising from insufficiency in packing or in strength of packages; illegibility, insufficiency, or obliterations of marks or numbers, the injurious effects of other goods, effects of climates, or heat of holds; risk of craft, or transshipment; effects of coaling on the voyage, or for the condition of re-exported or re-packed goods, or for the inside packages of tea, or for loss of specie, bullion, bank-notes, bonds, gold, silver, jewellery, watches, clocks, precious stones, precious metals, securities for money, paintings, sculptures, or other works of art, or any property of special value; nor beyond the value of £5 per cubic foot, nor exceeding £50 for any one package unless the value thereof shall have been declared at time of shipment and the Bill of Lading signed with a declaration of the nature and value of the goods appearing thereon, and extra freight in respect of same agreed upon and paid; nor for loss, injury or detention to packages intended for different Consignees, but made up into one package, unless the contents and

value of each separate package be given before shipment, and freight paid accordingly; an untrue declaration of the contents and value shall release the Company from all responsibility.

8. Live stock to be carried on deck or below at ship's option and at the sole risk of Shippers. The company will not be accountable for mortality or accidents of any kind in shipping or landing of stock. Freight on any kind of live stock to be in every instance according to the number shipped.

9. Fruit, shrubs, trees, meats, game, oysters, vegetables, and all kinds of perishable property to be carried on deck or below at Shipper's risk. Oils and all other liquids at Shipper's risk of leakage, unless caused by improper stowage. [50]

10. All cargoes liable to damage other cargo by reason of smell, risk of fire, explosion or other reason, except that of leakage or sweat, to be carried on deck at risk of Shipper.

11. If chemicals or other goods of a dangerous nature are shipped without being declared on Bill of Lading and specially arranged for, they may be thrown overboard and the shippers of such goods will be liable not only to the penalties imposed by Statute, but also for damages sustained in consequence of such shipment, either to persons, ship or cargo.

12. When, owing to bad weather, the exigencies of the Mail Service, or other cause, the goods cannot be safely shipped at the port of shipment or landed at the port of destination within the

time allotted for stoppage at such Port, the Company will not be responsible for any loss or damage caused by failure to ship or land the said goods or delay in shipment or landing thereof, and reserves to itself the right to convey any goods not landed to the next port on the voyage or to the final Port of call, to be returned thence at the first available opportunity.

13. The Company will not be responsible for overcarriage or landing of cargo at wrong Port from whatever cause, but will remedy same by first available opportunity.

14. Room at Ports of Transhipment is not guaranteed.

15. In case of quarantine the goods may be discharged into quarantine depot, hulk or other vessel, as required for the ship's despatch. Quarantine expenses upon the goods, of whatsoever nature or kind, shall be borne by the Shippers or Consignees.

16. Where lighterage, railage, etc., is incurred for transit of goods, either to or from the Company's steamers, the sole risk of same shall be borne by the Shippers, notwithstanding in some instances it may be the custom of the Company to defray the cost of such transit.

17. All fines and expenses or losses by detention of vessel or cargo, caused by incorrect or insufficient marking or by incorrect or incomplete description of weight, or any other particulars required by the Authorities at the Port of delivery, either upon the goods or the Bill of Lading, shall

be paid by the Shippers. The Company will not be responsible **for** losses which may arise in consequence of the laws of this or any other country.

18. Freight when payable by the Shipper is to be considered as earned, ship or goods lost or not lost. The Company shall have a lien on all goods for payment of freight and charges including back freight, dead freight, demurrage, forwarding charges, and charges for carriage to Port of shipment whether payable in advance or not and for all charges, expenses and damages for which the goods or the shippers or consignees thereof are liable under this Bill of Lading. The Company, may, at their discretion, and without being liable for any loss or damage thereby sustained, sell, at the expiration of 12 hours after arrival at the Port of consignment, any perishable goods on which the freight is unpaid. They may likewise, without any further notice than the herein contained, [51] at the expiration of 90 days from the time delivery of the goods should have been taken, sell such goods as are not of a perishable nature, or so much thereof as may be necessary to satisfy the said lien and retain from the proceeds of sale the freight and other charges due to the Company or to any other vessel in respect of the goods. Any such sale shall not prejudice or affect the Company's or other vessel's or her owner's right to recover from the person or persons liable to pay the same, the balance, if any, of freight and charges due in respect of the goods should the proceeds of sale thereof prove

insufficient to satisfy the said lien. Any surplus shall be payable to the Shipper.

19. The Company reserves the right to charge by weight, measurement or value, and to re-measure or re-weigh the goods at Port of destination, amending the charge for freight accordingly.

20. Perishable or other goods if landed with marks obliterated shall be accepted by consignee, if of the same description, in full satisfaction of any deficiency in the goods named in the Bill of Lading.

21. If required by the Company, one of the Bills of Lading must be presented or given up duly endorsed in exchange for the goods.

22. General Average to be adjusted according to York-Antwerp Rules, 1890.

IN WITNESS WHEREOF, the Master, Purser, or Agent of the said Steamship has signed two Bills of Lading, all of this tenor and date, one of which being accomplished, the others to stand void. Dated in Melbourne, this 12th day of March, 1917.

UNION STEAMSHIP CO. OF N. Z., LTD.

Per N. P. LAULSELL.

N. B.—Each clause in this Document shall be read with the following proviso:

PROVIDED that nothing herein contained shall relieve the Company from liability for loss or damage arising from harmful or improper condition of the ship's hold, or any other part of the ship in which goods are carried, or from negligence, fault, or failure in the proper loading, stowage, custody, care or delivery of the goods, or shall lessen,

weaken, or avoid any obligations of the Company to exercise due diligence, and to properly man, equip and supply the ship, to make and keep the ship seaworthy, and to make and keep the ship's hold refrigerating and cool chambers and all other parts of the ship where goods are carried, fit and safe for their reception, carriage and preservation, or to carefully handle and stow goods and to care for, preserve, and properly deliver them.

DANGEROUS GOODS: Merchants are cautioned against shipping (without being declared on Bill of Lading and specially arranged for with the Company) goods of a dangerous or damaging nature, as [52] by so doing they become responsible for all consequential damage, and also render themselves liable for penalties imposed by Statute.

This is the Bill of Lading mentioned and referred to in interrogatories Numbers two and three of Francis Archibald Drake and produced and shown to him at the time of his answering such interrogatories on Tuesday, the ninth day of December, 1919.

(Seal)

THOS. J. LEY,
Commissioner.

Sorting and Stacking Charges at San Francisco to be paid by Consignee.

GEORGE WILLS & CO., LIMITED,
H. HOOPER,
Manager.

[Endorsed]: No. 16,090. U. S. Dist. Court, Nor. Dist. Calif. Plff. Exhibit 1. Filed May 3, 1922. Maling, Clerk. [53]

Deposition of Mark Francis Shea, for Plaintiff.

The deposition of MARK FRANCIS SHEA was thereupon read in evidence as follows:

“Interrogatory No. 1. What is your name, residence and occupation?

Ans. Mark Francis Shea, Produce Merchant, Felinders St. Melbourne.

Interrogatory No. 2. Did your firm, in February and March, 1917, superintend the shipment of lot of onions on the Steamer ‘Waitotara’ consigned to George Wills & Sons, Limited, at San Francisco?

Ans. Yes.

Interrogatory No. 3. When did you commence to deliver these onions to the steamer?

Ans. Late in February, 1917.

Interrogatory No. 4. When was the delivery completed?

Ans. On March 7th, 1917.”

Mr. ZOOK.—If your Honor please, we object to that answer as immaterial in this matter, as to the date of delivery, except in the event that it is preliminary to proof of putting them on board within the contract time.

The COURT.—I don’t think I understand you.

Mr. ZOOK.—We object to the date of delivery to the steamer as immaterial, unless it is preliminary to the proof of shipment on board within the time provided by the contract. In other words, we will

endeavor to demonstrate to your Honor that a delivery to the steamer is not shipment, and that the contract has not been complied with by reason of failure to ship within the time.

The COURT.—Is there any question but what these were shipped on board the “Waitotara”?

Mr. ZOOK.—No, your Honor, but there is a question under the [54] clause of the contract requiring the onions to be shipped before the 10th of March, 1917, the bill of lading being dated March 12, 1917. Unless it is accompanied by further proof that they were put on board within the contract date, we think the bill of lading is immaterial.

The COURT.—I am inclined to think that it is admissible in response to the issue. The objection is overruled.

Mr. ZOOK.—Your Honor will allow us an exception.

The COURT.—If that means delivery aboard, of course that is a conclusion. Is the witness testifying to their being aboard the vessel?

Mr. HARWOOD.—Yes, your Honor.

The COURT.—Very well. I thought he said delivered to the steamer.

Mr. HARWOOD.—I understand that when goods are delivered to the steamer it means putting them on the steamer. That was the intention of the witness, and that was the intention of the interrogatory. These interrogatories were settled by the Court. That was the only purpose in asking the witness when they were delivered to the steamer.

According to the authorities, when goods are delivered to the steamer they are delivered on board.

The COURT.—I should think that would be true. A party is not permitted to put them on board.

Mr. ZOOK.—I am prepared to argue the question that delivery to the steamer is not equivalent to putting them on board. To prove shipment they must prove that the goods are on board the steamer within the contract time, and that “delivery to the steamer” is uncertain. I will call your Honor’s attention to a very leading Federal case.

The COURT.—I do not see the materiality of that consideration [55] here anyhow. There is no question but what they were shipped on this steamer. She did not sail on the 10th, but she sailed thereafter, and the goods were aboard of her.

Mr. ZOOK.—But the point that we make, and which we are prepared to argue and to cite authority upon is this, that the bill of lading is *prima facie* evidence of the date of the shipment.

The COURT.—What is the materiality of that in this controversy?

Mr. ZOOK.—One of the vital points in this case is whether or not under this contract there was a shipment effected from Australia by the steamer on March 10. Our claim is, first, that there is no proof of any shipment on any other date than the date of the bill of lading, March 12, two days later; that delivery to the steamer is not equivalent to shipment.

The COURT.—I don't see the materiality of that question in this case at all. There is materiality in the question of delivery. Of course, if the failure to deliver on the 10th instead of on the 12th, as recited in the bill of lading, appeared to be material, that is one thing; but where it does not, as in accordance with the statement here and the stipulation here, I don't see the consideration to be given to it.

Mr. ZOOK.—We have not stipulated as to that. We take the position as a broad proposition of law that time is of the essence of mercantile contracts of this nature.

The COURT.—Where time enters into the results at all, yes, that is undoubtedly so, but where it is a date which, under the circumstances, has been shown to be wholly immaterial, then I do not think it is of the essence.

Mr. ZOOK.—But the contract reads, "Shipment to be effected from Australia by steamer on the 10th of March, 1917." That is the effective date. Unless the shipment were made by March 10, [56] 1917, the contract is not complied with. That is the first breach. We claim a succession of breaches in this matter. We claim that delivery to the ship is not equivalent to putting on board. We would like to cite your Honor the cases upon that point.

The COURT.—I don't care anything about that now. This answer, as I understand it, is intended to mean that they shipped them on board the steamer on that date. If you can show that that is not what is intended, you may do so.

Mr. ZOOK.—If your Honor is of the opinion that delivery to the steamer is equivalent to shipment on board—

The COURT.—No, I am not saying that at all. This witness is saying that they went on board.

Mr. ZOOK.—No, your Honor.

Mr. HARWOOD.—That is what is intended. That was what was intended by the interrogatory, and I think that is what the witness intended.

The COURT.—It is not a question of what you think or what I think the witness intended; the meaning of the answer must be taken from the words used by the witness. Just read that.

Mr. HARWOOD.—“Q. When did you commence to deliver these onions to the steamer? A. Late in February, 1917. “Q. When was the delivery completed? A. On March 7, 1917.”

The COURT.—I misapprehended that. I thought he said they were completely on board the steamer at that time.

Mr. HARWOOD.—I think that is what he intended.

The COURT.—It is not what he intended, or what you intend, or what I intend, it is what the words import.

Mr. ZOOK.—We object to that testimony on the ground that the date of delivery to the steamer is immaterial, except as preliminary [57] to a showing of putting them on board within the contract date.

The COURT.—At this time, though, the matter is not objectionable.

Mr. ZOOK.—We will reserve the right to object to that later.

The COURT.—Very well.

“Interrogatory No. 5. Before the completion of the delivery of the onions to the Steamer, had you been informed by Union Steamship Company of New Zealand, Ltd., or by anyone else, that the ‘Waitotara’ would not sail direct to San Francisco?

Ans. No.

Interrogatory No. 6. Before the completion of the delivery of the onions to the steamer, had any one connected with the firm of H. Hecht & Co., to your knowledge, been informed that the ‘Waitotara’ would not sail direct to San Francisco.

Ans. No.

Interrogatory No. 7. When did you first learn that the ‘Waitotara’ would proceed to San Francisco via Vancouver?

Ans. I did not know until after the boat had actually sailed.

Interrogatory No. 8. At or before the time of the delivery of the onions to the Steamer, did you know that the ‘Waitotara’ would proceed to San Francisco via Vancouver?

Ans. No.

Interrogatory No. 9. To your knowledge, at or before the time of the delivery of the onions to the steamer, did anyone connected with H. Hecht & Co., know that the ‘Waitotara’ would proceed to San Francisco via Vancouver?

Ans. No. [58]

Interrogatory No. 10. At the time of the delivery of said onions to the 'Waitotara,' what was the condition of the onions?

Ans. Good.

Interrogatory No. 11. At the time of the delivery of said onions to the 'Waitotara,' what was the quality of said onions?

Ans. Best quality Australian brown onions."

Mr. HARWOOD.—We offer in evidence the certificate as to the quality of the onions. I do not think it is material, because they were not entitled to a certificate unless they took the onions, but nevertheless it may be material. We made an offer in writing to deliver the certificate at the same time we offered to deliver the onions, but they refused.

The COURT.—Has the certificate any legal significance?

Mr. HARWOOD.—It is called for by the contract.

The COURT.—What does the contract say on that?

Mr. HARWOOD.—Quality of onions delivered to steamer in Australia to be guaranteed and a certificate for same will be provided.

Mr. ZOOK.—We object to the certificate on the ground that it has no connection with the onions in this case. That is a certificate as to a 4400 packages Vict. onions.

Mr. HARWOOD.—We can prove by other evidence that the 4400 packages included this shipment.

Mr. ZOOK.—We are not aware of any identity between Viet. onions and Australian brown onions.

The COURT.—You will have to lay a foundation. This does not seem to meet your necessities.

Mr. HARWOOD.—I will call Mr. Anderson to the stand.

Testimony of A. H. Anderson, for Plaintiff.

A. H. ANDERSON was thereupon called as a witness for the [59] plaintiff, and after being duly sworn, testified as follows:

Mr. HARWOOD.—Q. You are the manager for California of the plaintiff in this case, are you?

A. I am.

Q. You were the assistant manager in 1917?

A. I was.

Q. At the time of the shipment of these onions?

A. Yes.

Q. I refer you to the bill of lading which I offered in evidence, which calls for 4428 crates of onions; I also call your attention to the inspector's certificate, which refers to 4400 packages of onions shipped according to the certificate on the "Waitotara," and consigned to your firm, and I ask you if your firm had any onions aboard the "Waitotara" except the onions covered by the bill of lading?

A. No, we did not.

Q. From whom did you receive this certificate?

A. From George Wills & Co., limited, attached to the shipping documents.

Q. Was it attached to the bill of lading when you received it? A. Yes.

(Testimony of A. H. Anderson.)

Q. It was attached to the bill of lading?

A. Yes, with all the shipping documents attached.

Q. And this is the bill of lading? A. Yes.

Mr. HARWOOD.—I offer this in evidence.

Mr. ZOOK.—We object to it as immaterial, irrelevant and incompetent, and there is no identity between the onions shown there in that certificate and the particular onions involved in this case, which are Australian brown onions.

The COURT.—I think the objection is good, Mr. Harwood. You have not established identity between the onions involved in this certificate and the shipment involved here.

Mr. HARWOOD.—I thought I had shown it, your Honor.

The COURT.—No, you have simply shown by the witness that there were no other onions received by them on the “Waitotara,” [60] excepting these, but that does not show that this certificate had reference to brown Australian onions.

Mr. HARWOOD.—The contract says, the quality of onions to be delivered to the steamer to be guaranteed and certificate for same to be provided. It is very indefinite as to what the certificate means. I don't know that it is necessary, according to the contract for shipment, to describe the onions as brown Australian, if it describes them as onions and refers to the very onions described in the bill of lading.

The COURT.—You mean that it is not necessary for the certificate to show what class of onions they were?

(Testimony of A. H. Anderson.)

Mr. HARWOOD.—As long as it guarantees the quality of them, it is not necessary to describe them fully as brown Australian onions. It says: “Quality of the onions delivered to steamer in Australia to be guaranteed, and a certificate for same will be provided.”

The COURT.—What is included in the term “quality”? That is a very material thing. Here is a contract calling for a certain specified character of onion.

Mr. HARWOOD.—This certificate says, the onions are in good order and condition at time of inspection.

The COURT.—But the question is whether it relates to the onions that are involved here. It certainly relates to a different quantity, doesn’t it? You did not receive any such quantity as 4428 crates.

Mr. HARWOOD.—The amount is practically the same, your Honor. It is 4400 in the certificate, and 4428 in the bill of lading.

The COURT.—Oh, is it?

Mr. HARWOOD.—Yes, your Honor.

The COURT.—I think I will let the certificate go in.

Mr. HARWOOD.—We ask that it be marked Plaintiff’s Exhibit No. 2. [61]

Said certificate was thereupon received and read in evidence, marked Plaintiff’s Exhibit No. 2, and was and is in words and figures following, to wit: [62]

Plaintiff's Exhibit No. 2.

No. A 15013.

G.

R.

Department of Agriculture.

Victoria.

INSPECTOR'S CERTIFICATE.

Melbourne, Mch. 8th, 1917.

I hereby certify that I have inspected the under-mentioned onions consigned by G. Wills & Co. of Sydney to order of San Francisco per "S. S. Waitotara" and have found them to be, to the best of my knowledge, clean and free from ~~Irish Blight~~ in any state of development and from any other onion disease proclaimed. In good order and condition at time of inspection.

Goods.	Pkgs.	Name and Address of Grower.	Marks.
Viet Onions	4400		G W S F

The cases containing the above-mentioned onions are new.

FIRST QUALITY.

H. E. GRASS,
Inspector.

[Endorsed]: No. 16,090. U. S. Dist. Court, Nor. Dist. Calif. Plff. Exhibit 2. Filed May 3d, 1922. Maling, Clerk. [63]

Plaintiff thereupon rested.

Thereupon the defendants moved for a nonsuit upon the following grounds:

First, that it affirmatively appears from plaintiff's evidence that the goods were not put on board the vessel before the 10th day of March, as called for by the contract. That time was of the essence

of the contract, under the general mercantile law, a specific time having been provided for delivery, and the general presumption being that time is of the essence in mercantile contracts between foreign ports.

Second, upon the ground that it affirmatively appears from the evidence in the case that the vessel did not leave Australia until after the 16th day of March, 1917, and that the departure from Australia at such time is not an effective shipment such as is called for by the contract.

Third, it affirmatively appears from the contract that the contract of the plaintiff was to ship these onions and to deliver them duty paid on the dock in San Francisco; that it affirmatively appears that the onions arrived on May 19, some 69 days from Australia, and by way of Melbourne, Sidney, Wellington, Vancouver, which, as your Honor will take judicial notice of, is a considerable deviation from the direct route from Australia to San Francisco; that the duty being upon the plaintiffs to deliver, their duty was to choose a reasonable method of delivery, and that such method of delivery affirmatively appears from the plaintiff's evidence not to have been a reasonable method of carrying out their contract.

(Thereupon counsel argued the motion for nonsuit.)

The COURT.—I am very much inclined to the view, under the arguments which have been had, Mr. Harwood, that you have not shown [64] an effective shipment of these goods in accordance

with the contract, that is, having the nature of the goods in view and the stipulations in the contract. I do not know what other meaning to give to the words "to be effected" in connection with the words used there than to be accomplished. You have a stipulation there that the shipment should be effected from Australia. I am always reluctant to grant nonsuits. I always like to see what there is in the merits. When you are dealing with a written contract, however, you have to bring yourself within its terms if those terms inhere in its essential requisites. This certainly does.

Mr. HARWOOD.—If that language in that contract bears the construction contended for, and which your Honor seems inclined to hold, there will be no sense in going on with the trial.

The COURT.—I think that it would be better—I am inclined to think that unless you had some evidence which would tend to exculpate you in rebuttal from the situation which you are now in, that even if I were to deny the motion now the defendants would have a right, and in order to avail themselves of the question involved they would be called upon to renew the motion upon the completion of the evidence. I am satisfied that standing on the evidence as it is now, I would be called upon to sustain the motion. I might as well do it now, and if this case is reviewed and the Circuit Court of Appeals should take a different view, then the evidence, being substantially all in the depositions and in the stipulations, would still be before us, there would be no loss in that regard.

Let the motion for nonsuit be granted.

Said order of the Court, granting said motion for a nonsuit, was and is in words and figures following, to wit: [65]

“Defendants moved for a nonsuit on the grounds stated and after arguments the motion was submitted and being fully considered it was ordered that said motion be and is hereby granted and that a judgment of nonsuit, with costs to the defendants, be entered herein; to which ruling the plaintiff duly excepted.”

To the said order, judgment and entry of the Court, granting said motion for a nonsuit, council for plaintiff then and there duly excepted.

EXCEPTION No. 8.

Thereupon, to wit, on the 3d day of May, 1922, the Court gave and rendered its judgment herein in favor of the defendants and against the plaintiff, which said judgment is a part of the judgment-roll herein.

To the said judgment, the plaintiff duly excepted.

EXCEPTION No. 9.

ASSIGNMENTS OF ERROR.

The plaintiff now assigns as error to be used upon its appeal from said judgment or order granting said nonsuit, and on its appeal from the judgment herein, the following, to wit:

ERRORS OF LAW.

That the Court erred in each of its rulings striking out evidence over the objection and exception of plaintiff, as specified in Exceptions Nos. 1, 2, 3, 4, 5, 6, and 7.

That the Court erred in granting defendants' motion for a nonsuit as specified in Exception No. 8 set forth in the foregoing [66] bill of exceptions.

That the Court erred in rendering judgment in favor of the defendants and against plaintiff, as specified in Exception No. 9.

And now, within the time allowed by law, plaintiff presents this its bill of exceptions to be used upon appeal from said order or judgment of nonsuit, and on its appeal from said judgment in favor of defendants and against plaintiff.

Dated: May 12th, 1922.

ALFRED J. HARWOOD.

Attorney for Plaintiff.

Stipulation Re Bill of Exceptions.

IT IS HEREBY STIPULATED AND AGREED that the foregoing Bill of Exceptions is true and correct and may be settled, certified and allowed by the Judge.

Dated: May 12th, 1922.

ALFRED J. HARWOOD,

Attorney for Plaintiff.

CHARLES W. SLACK,

EDGAR T. ZOOK and

ALFRED T. CLUFF,

Attorneys for Defendants.

Certificate of Judge to Bill of Exceptions.

The foregoing bill of exceptions is hereby settled and allowed and certified to be a true bill of exceptions this 25th day of May, 1922.

WM. C. VAN FLEET,
Judge. [67]

Service of the within proposed bill of exceptions is hereby admitted this 12th day of May 1922.

EDGAR T. ZOOK,
CHARLES W. SLACK and
Attorneys for Defendants.

[Endorsed]: Filed May 25, 1922. Walter B. Maling, Clerk. [68]

(Title of Court and Cause.)

Petition for Writ of Error.

To the Honorable WILLIAM C. VAN FLEET,
Judge of the Above-entitled Court, and to the
Judge or Judges of said District Court:

Now comes the above-named plaintiff, George Wills & Sons, Limited, a corporation, by Alfred J. Harwood, its attorney and says:

That on or about the 3d day of May, 1922, this Court entered a judgment herein, in favor of defendants and against plaintiff, in which judgment and the proceedings prior thereunto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors, which is filed with this petition:

WHEREFORE plaintiff prays that a writ of error may issue in its behalf to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 26th day of May, 1922.

ALFRED J. HARWOOD,
Attorney for Plaintiff.

[Endorsed]: Filed May 26, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [69]

(Title of Court and Cause.)

Assignment of Errors.

Now comes the above-named plaintiff, George Wills & Sons, Limited, a corporation, and in connection with its petition for a writ of error makes the following assignment of errors, which it avers were committed by the Court upon the trial of this cause and in the rendition of the judgment against plaintiff appearing upon the record herein, to wit:

I.

The Court erred in striking out part of the answer of the witness Francis Archibald Drake upon the ground that it was hearsay (as appears in exception No. 1 in plaintiff's bill of exceptions herein). The interrogatory and the answer thereto, a part

of which was stricken out, as aforesaid, are as follows:

“Interrogatory No. 6. At the time this space was booked, for what voyage was the ‘Waitotara’ advertised or Scheduled?

Ans. Our advice was that the ‘Waitotara’ was engaged to sail for San Francisco, and we knew of no extraordinary deviation.”

The part of said answer stricken out by the Court, as aforesaid, was the words “and we knew of no extraordinary deviation.”

II.

The Court erred in striking out the answer of the witness Francis Archibald Drake (as appears in Exception No. 2 in plaintiff’s bill of exceptions herein), on the ground that the certificate referred to in the contract between the parties spoke for itself. The interrogatory and the answer thereto which was stricken out are as follows: [70]

“Interrogatory No. 22. At the time of the delivery of said onions to the ‘Waitotara,’ what was the condition of the onions?

Ans. First class according to Government Grader’s Certificate.”

III.

The Court erred in striking out the answer of the witness Francis Archibald Drake (as appears in Exception No. 3 in plaintiff’s bill of exception herein), on the same ground on which the answer to Interrogatory No. 22 was stricken out. The interrogatory and the answer thereto which was stricken out are as follows:

“Interrogatory No. 23. At the time of the delivery of said onions to the ‘Waitotara,’ what was the quality of said onions?”

Ans. Brown Spanish, and also see No. 22.”

IV.

The Court erred in striking out part of the answer of the witness Francis Archibald Drake (as appears in Exception No 4 in the plaintiff’s bill of exceptions herein), on the ground that said part of said answer was the conclusion of the witness. The interrogatory and the answer thereto, a part of which was stricken out, as aforesaid, are as follows:

“Cross-Interrogatory No. 4. Do you understand by ‘sailing direct to San Francisco’ that the steamer would sail from Melbourne to San Francisco in the most direct line compatible with the proper navigation of the steamer and without touching at any intermediate or other ports on the way?”

Ans. Yes, that would be my understanding, but the shipping agents could divert under Bill of Lading clauses, notwithstanding a statement that a vessel was a direct steamer.”

The part of said answer which was so stricken out was all of said answer after the word “understanding.” [71]

V.

The Court erred in striking out a part of the answer of the witness Francis Archibald Drake (as appears in Exception No. 5 in plaintiff’s bill of exceptions herein), on the ground that said part of said answer was not responsive. The interrogatory

and answer thereto, a part of which was stricken out, as aforesaid, are as follows:

“Cross-Interrogatory No. 6. Did you make any inquiry of any of the officials of the Union Steamship Company, Ltd., before you commenced to deliver the onions covered by the bill of lading mentioned in Interrogatory No. 2 as to the time of departure or route to be followed by the ‘Waitotara’?”

Ans. Yes, I did make inquiry and was informed that the ‘Waitotara’ would sail on the 10th March from Melbourne to San Francisco as a direct steamer, which information it was necessary for me to ascertain in the first negotiating for the business.”

The part of said answer which was so stricken out was all of said answer after the word “steamer.”

VI.

The Court erred in striking out part of the answer of the witness Francis Archibald Drake (as appears in Exception No. 6 in plaintiff’s bill of exceptions herein), on the ground that it was argumentative and not responsive. The interrogatory and answer thereto, a part of which was stricken out, are as follows:

“Cross-Interrogatory No. 7. Did you make any such inquiry prior to the completion of delivery of the onions to the steamer?”

Ans. No direct inquiry was made to the company as to any alteration in the date of sailing between the date that the space was booked and the date of the completion of the delivery

of the onions to this steamer, for having booked space on her we naturally did not think this was necessary, for it was fair to assume that as interested parties, the company would have advised us, without [72] application to them, if a serious alteration in the date of sailing or in the sailing route was made. We were never informed by the Company of any such alteration.”

The part of said answer which was so stricken out was that part thereof reading as follows:

“having booked space on her we naturally did not think this was necessary, for it was fair to assume that as interested parties, the company would advise us, without application to them, if a serious alteration in the date of sailing or in the sailing date was made.”

VII.

The Court erred in striking out the answer of the witness Francis Archibald Drake to Cross-Interrogatory No. 10, on the ground that the answer was not responsive to the question (as appears in Exception No. 7 in the plaintiff's bill of exceptions herein). The said interrogatory and the answer thereto, so stricken out, are as follows:

“Cross-Interrogatory No. 10. Are not the sailing dates and arrivals of the Oceanic Line Steamers and the route to be followed by them on each voyage advertised a year or more in advance of their sailing dates?

Ans. Whilst dates might be fixed as far as twelve months ahead no booking for space for

anything like such a time would be made, but this is altogether outside the question, and has nothing whatever to do with 'Waitotara' sailing which was a specific instance."

VIII.

The Court erred in granting defendants' motion for a nonsuit (as appears in Exception No. 8 in the plaintiff's bill of exceptions herein). Said motion for a nonsuit was made by defendants on the following grounds:

"First, that it affirmatively appears from plaintiff's evidence that the goods were not put on board the vessel before the 10th day [73] of March, as called for by the contract. That time was of the essence of the contract, under the general mercantile law, a specific time having been provided for delivery, and the general presumption being that time is of the essence in mercantile contracts between foreign ports.

Second, upon the ground that it affirmatively appears from the evidence in the case that the vessel did not leave Australia until after the 16th day of March, 1917, and that the departure from Australia at such time is not an effective shipment such as is called for by the contract.

Third, it affirmatively appears from the contract that the contract of the plaintiff was to ship these onions and to deliver them duty paid on the dock in San Francisco; that it affirmatively appears that the onions arrived on May 19, some 69 days from Australia, and by way of Melbourne, Sidney, Wellington, Vancouver,

which, as your Honor will take judicial notice of, is a considerable deviation from the direct route from Australia to San Francisco; that the duty being upon the plaintiffs to deliver, their duty was to choose a reasonable method of delivery, and that such method of delivery affirmatively appears from the plaintiff's evidence not to have been a reasonable method of carrying out their contract."

IX.

The Court erred in giving and rendering its judgment herein in favor of the defendants and against the plaintiff (as appears in Exception No. 9, in the plaintiff's bill of exceptions herein). Said judgment is a part of the judgment-roll herein.

WHEREFORE said plaintiff, George Wills & Sons, Limited, a corporation, prays that the judgment of said District Court may be reversed and that said plaintiff may have judgment against said defendants as prayed in its complaint herein.

ALFRED J. HARWOOD,
Attorney for George Wills & Sons, Limited, a Corporation, Plaintiff in Error.

[Endorsed]: Filed May 26, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [74]

(Title of Court and Cause.)

**Order Allowing Writ of Error and Fixing Amount
of Bond.**

In this 26th day of May, 1922, came the above-named George Wills & Sons, Limited, a corporation, plaintiff herein, by Alfred J. Harwood, its attorney, and filed herein and presented to this Court, its petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by it, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises;

ON CONSIDERATION WHEREOF, this Court does allow the writ of error, upon the said plaintiff giving a bond, according to law, in the sum of Four Hundred Dollars, lawful money of the United States, which said bond shall operate as a *superseas* bond.

Dated at San Francisco, this 26th day of May, 1922.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed May 27, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [75]

(Title of Court and Cause.)

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That, whereas, lately in a District Court of the United States, in and for the Northern District of California, Second Division, in a suit depending in said court between the George Wills & Sons, Limited, a corporation, as plaintiff, and William R. Larzelere and Joseph J. Sweeney, Copartners doing business under the firm name of Larzelere, Sweeney Company, as defendants, a judgment was rendered against the said George Wills & Sons, Limited, a corporation, for costs and disbursements in the sum of Forty Dollars and Fifty-five cents (\$40.55), and the said George Wills & Sons, Limited, a corporation, having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court, to reverse the judgment in the aforesaid suit and a citation having issued directed to said William R. Larzelere and Joseph J. Sweeney, copartners doing business under the firm name of Larzelere, Sweeney Company, citing and admonishing them to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, State of California, in said court, on the — day of June, 1922.

NOW, THEREFORE, in consideration of the premises and of such writ of error, the undersigned sureties are held and firmly bound unto the above-named defendants, William R. Larzelere and Joseph

J. Sweeney, copartners doing business under the firm name of Larzelere, Sweeney Company, in the full and just sum of Four Hundred Dollars(\$400.00), lawful money of the United States, to be paid to said defendants, William R. Larzelere and Joseph J. Sweeney, [76] copartners doing business under the firm name of Larzelere, Sweeney Company, or their assigns, for which payment well and truly to be made, the undersigned bind themselves by these presents.

The condition of the above obligation is such that if the said George Wills & Sons, Limited, a corporation, the plaintiff in said action, and plaintiff in error aforesaid, shall prosecute said writ of error to effect and answer all damages and costs that may be awarded against it if it fails to make its said plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF the said sureties have hereunto set their hands and seals this 26th day of May, 1922.

A. H. ANDERSON. (Seal)

H. L. RYAN. (Seal)

The foregoing sureties are hereby approved.

CHARLES W. SLACK and

EDGAR T. ZOOK,

Attorneys for Defendants in Error.

Bond approved.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed May, 27, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [77]

(Title of Court and Cause.)

Affidavit of Service of Citation on Writ of Error.

State of California,

City and County of San Francisco,—ss.

Harold A. Wyatt, being duly sworn, deposes and says:

That he is and was at all times herein mentioned a citizen of the United States and a resident of the State of California, over the age of eighteen years.

That on the 6th day of June, 1922, he served a copy of the original citation on writ of error, now on file in the office of the clerk of the above-entitled court, on William R. Larzelere, by delivering to and leaving with the said William R. Larzelere, personally, in the City and County of San Francisco, State of California, the said copy of the citation referred to.

That on the 9th day of June, 1922, he served a copy of the above-mentioned citation on Joseph J. Sweeney, by delivering to and leaving with the said Joseph J. Sweeney personally, in the City and County of San Francisco, State of California, the said copy of the citation heretofore referred to.

HAROLD A. WYATT.

Subscribed and sworn to before me this 12th day of June, 1922.

[Seal]

E. M. CLARK,

Notary Public of the State of California, in and for the City and County of San Francisco.

[Endorsed]: Filed Jun. 13, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [78]

(Title of Court and Cause.)

Praeipice for Record on Writ of Error.

To the Clerk of the Above-entitled Court:

Please prepare and forward to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, copies of the following papers on plaintiff's writ of error herein, viz.:

1. Judgment-roll.
2. Plaintiff's bill of exceptions.
3. Petition for writ of error.
4. Assignment of errors.
5. Order allowing writ of error and fixing amount of bond.
6. Writ of error.
7. Bond on writ of error.
8. Citation on writ of error.

Dated: May 31st, 1922.

ALFRED J. HARWOOD,
Attorney for Plaintiff.

[Endorsed]: Filed Jun. 1, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [79]

(Title of Court and Cause.)

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing seventy-nine (79) pages, numbered from 1 to 79, inclusive, to be full, true and correct copies of the record and

proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$35.30; that said amount was paid by the plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 21st day of July, A. D. 1922.

[Seal] WALTER B. MALING,
Clerk United States District Court for the North-
ern District of California. [80]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

United States of America,
Ninth Judicial Circuit,—ss.

Writ of Error.

The President of the United States of America:
To the Honorable the Judge of the Southern
Division of the District Court of the United
States for the Northern District of California,
Second Division, GREETING:

Because, in the record and proceedings, as also
in the rendition of the judgment of a plea, which
is in the said District Court, before you, at the

March, 1922, term thereof, wherein George Wills & Sons, Limited, a corporation, is plaintiff in error, and William R. Larzelere and Joseph J. Sweeney, copartners doing business under the firm name of Larzelere, Sweeney Company, are defendants in error, and wherein George Wills & Sons, Limited, a corporation, was plaintiff and said William R. Larzelere and Joseph J. Sweeney, copartners doing business under the firm name of Larzelere, Sweeney Company, were defendants, a manifest error has happened, to the great damage of the said George Wills & Sons, Limited, a corporation, the plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same [81] at the City and County of San Francisco, in the State of California, where said court is sitting, on the 26th day of June, 1922, and within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the

laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States, the 27th day of May, A. D. 1922.

[Seal]

WALTER B. MALING,
Clerk of the District Court of the United States
for the Northern District of California, Second
Division.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,
United States District Judge.

Due service and receipt of a copy of the within writ of error is hereby admitted ths 27th day of May, 1922.

CHARLES W. SLACK,
EDGAR T. ZOOK,
Attorneys for Defendants and Defendants in Error.
[82]

[Endorsed]: No. 16,090. In the United States Circuit Court of Appeals for the Ninth Circuit. Writ of Error. Filed Jun. 3, 1922. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[82½]

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mentioned is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court:

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [83]

Citation on Writ of Error.

United States of America,
Northern District of California,—ss.

The President of the United States to William R. Larzelere and Joseph J. Sweeney, Copartners Doing Business Under the Firm Name of Larzelere, Sweeney Company, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the 26th day of June, 1922, being

within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Southern Division of the District Court of the United States for the Northern District of California, Second Division, wherein George Wills & Sons, Limited, a corporation, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said George Wills & Sons, Limited, a corporation, plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WM. C. VAN FLEET, United States District Judge for the Northern District of California, this 27th day of May, 1922.

WM. C. VAN FLEET,
United States District Judge.

Due service and receipt of a copy of the within citation on writ of error is hereby admitted this 29th day of May, 1922.

CHARLES W. SLACK,
EDGAR T. ZOOK,

Attorneys for Defendants and Defendants in Error.

[84]

The undersigned defendants named in the within citation hereby admit due service of said citation this 31st day of May, 1922.

_____,
_____,
Copartners Doing Business Under the Firm Name
of Larzelere Sweeney Company.

[Endorsed]: No. 16,090. Citation on Writ of Error. Filed Jun. 5, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3898. United States Circuit Court of Appeals for the Ninth Circuit. George Wills & Sons, Limited, a Corporation, Plaintiff in Error, vs. William R. Larzelere and Joseph J. Sweeney, Copartners Doing Business Under the Firm Name of Larzelere, Sweeney Company, Defendants in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed July 26, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit.

GEORGE WILLS & SONS, LTD., a Corporation,
Plaintiff in Error,

vs.

WILLIAM R. LARZELERE et al.,
Defendants in Error.

Order Extending Time to and Including July 26, 1922, to File Record and Docket Cause.

Good cause being shown, it is hereby ordered that the plaintiff in error may have to and including July 26, 1922, within which to file the record on writ of error and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated June 26, 1922.

W. H. HUNT,
U. S. Circuit Judge.

[Endorsed]: No. 3898. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including July 26, 1922, to File Record and Docket Cause. Filed Jun. 26, 1922. F. D. Monckton, Clerk. Refiled Jul. 16, 1922. F. D. Monckton, Clerk.